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No. 424

In the Supreme Court of the United States

OCTOBER TERM, 1942

FEDERAL SECURITY ADMINISTRATOR, PETITIONER

v.

THE QUAKER OATS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL SECURITY ADMINISTRATOR

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 679–689) is reported in 129 F. (2d) 76. The Findings of Fact of the Federal Security Administrator appear as part of his Final Order at R. 610–627. The Administrator's regulations concerning "farina" and "enriched farina," also part of his Final Order, appear at R. 637–638.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 26, 1942 (R. 689). The petition

for a writ of certiorari was filed on September 26, 1942, and was granted November 9, 1942. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 701 (f) (4) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 52 Stat. 1040, 1055, 21 U. S .C., Sec. 371.

QUESTIONS PRESENTED

The ultimate question presented is whether regulations 15.130 and 15.140 of the Federal Security Administrator, excluding vitamin D from the definition and standard of identity for "farina" and permitting it only in "enriched farina" in which vitamin B_1, riboflavin, nicotinic acid, and iron are required, are valid. This question depends in turn upon the subsidiary questions:

(a) whether there is substantial evidence in support of the Federal Security Administrator's finding that indiscriminate enrichment of farina with vitamin and mineral supplements would tend to confuse and mislead consumers;

(b) whether, if so, the Administrator has statutory authority, upon finding the existence of such a tendency, to promulgate a standard of identity which excludes disclosed, non-deleterious ingredients, in order to promote honesty and fair dealing in the interest of consumers;

(c) whether the Administrator's treatment of vitamin D is reasonable.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 1046, 1055 (21 U. S. C., Secs. 341 and 371), in pertinent part, provides as follows:

> SEC. 401. Whenever in the judgment of the Administrator [1] such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container * * *. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. * * *
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> * * * * * *
>
> SEC. 701 (e). The Administrator, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor,

[1] The terms "Federal Security Administrator" and "Administrator" have been substituted for the actual language "Secretary of Agriculture" and "Secretary" because by Reorganization Plan No. IV, 54 Stat. 1234, the Federal Food and Drug Administration and its functions were transferred to the Federal Security Agency and the functions of the Secretary of Agriculture relating to the administration of the Act were transferred so as to be exercised by the Federal Security Administrator.

shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of the Act: 401. * * * At the hearing any interested person may be heard in person or by his representative. As soon as practicable after completion of the hearing, the Administrator shall by order make public his action in issuing, amending, or repealing the regulation or determining not to take such action. The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based.

SEC. 701 (f) (1). In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order * * *.

* * * * *

SEC. 701 (f). (3). The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently * * *. The findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive.

STATEMENT

On May 26, 1941, after notice and hearing under Section 701 (e) of the Act, the Acting Federal

Security Administrator promulgated a Final Order containing regulations fixing and establishing definitions and standards of identity for sixteen milled wheat products, including "farina" and "enriched farina" (R. 628–639). Regulation 15.130 defines farina as the food prepared by grinding and bolting cleaned wheat other than durum wheat and red durum wheat to a prescribed fineness, with bran coat and germ removed to a prescribed extent (R. 637). There is no provision for optional ingredients in farina. Regulation 15.140 defines enriched farina as farina conforming to Regulation 15.130 but containing in addition prescribed minimum quantities of vitamin B_1, riboflavin,[2] nicotinic acid, and iron; enriched farina may also, but is not required to, contain vitamin D, calcium, wheat germ, or disodium phosphate as optional ingredients (R. 637–639).

Respondent, The Quaker Oats Company, has since 1932 manufactured and marketed a product consisting of farina plus vitamin D, under the package label "Quaker Farina Wheat Cereal Enriched with Vitamin D" or "Quaker Farina Enriched by the Sunshine Vitamin" (R. 218, 640). The back panel label of the package bears the legend, "Contains 400 U. S. P. Units of Vitamin D per ounce supplied by approximately the addition

[2] Largely because of the effects of war priorities and lend-lease requirements the effective date of the riboflavin provision has been postponed until April 20, 1943 (7 Fed. Reg., p. 3055, April 25, 1942).

of ½ of 1 percent irradiated dry yeast" (R. 218). Upon the issuance of the Administrator's Final Order, respondent filed a petition for judicial review in the court below (R. 640–644) alleging that the effect of the standards for farina and enriched farina is to require it either to cease adding vitamin D or to include in any farina which "purports to be or is represented as" enriched farina the prescribed minimum quantities of vitamin B_1, nicotinic acid, and iron, in addition to the vitamin D which it now uses.[4] The petition further alleged that the regulations were invalid upon the grounds, *inter alia*, that they were unreasonable, not based upon substantial evidence, and beyond the statutory authority conferred upon the Administrator.

The Administrator's findings relating to vitamin and mineral enrichment of flour[5] and farina (R. 617–619, 624–627) may be summarized as follows:

Flour is a principal item of the American dietary particularly among low-income groups (R. 617).

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[4] This allegation was not denied and was conceded by the Administrator in the court below. This result flows from the application of Section 403 (g).

[5] The findings with respect to enrichment of flour are incorporated by reference into the farina findings. Finding 83, R. 628. This recognizes the witnesses' treatment of the separate enrichment problems in each food as merely phases of the general problem of enrichment. See e. g., R. 89–105, 116, 165, 184. Although the respondent disputed below the relevance of the evidence and findings of flour enrichment to farina enrichment, the court below recognized the relationship between the two. R. 681. See the request by respondent's representative that his and all other enrichment testimony on flour be made applicable to farina, R. 217.

Farina is not as widely consumed as flour, but is used in macaroni products and as a breakfast food. It is extensively used as a cereal food for children and in many cases is the only cereal fed to children during a period of their growth (R. 626).

Farina and flour are both manufactured by grinding whole wheat and separating off the bran coat and germ, the finished product consisting almost entirely of the remaining portion of the wheat known as endosperm (R. 611, 625). The process of milling off the bran and germ removes those portions which are richest in vitamins and minerals (R. 626). The original whole wheat is rich in vitamin B_1, riboflavin, nicotinic acid, and iron, which are lacking in many diets, particularly among low-income groups (R. 617, 618). Deficiencies of calcium also exist. Vitamin D deficiency is widespread among infants and children, but calcium and vitamin D are not listed among the elements present in wheat in substantial quantities (R. 617, 618).

Millers have recently placed on the market flours and farinas which have been "enriched" by the addition of various vitamins and minerals (R. 617–618, 626). The composition of these enriched products, however, varies widely and unless a standard of identity is adopted which limits the kinds and amounts of enrichment, "the manufacturers' selection of the various nutritive elements and combinations of elements on the basis of economic and

merchandising considerations is likely to lead to a great increase in the diversity, both qualitative and quantitative, in enriched flour offered to the public. Such diversity would tend to confuse and mislead consumers as to the relative value of and need for the several nutritional elements, and would impede rather than promote honesty and fair dealing in the interest of consumers". (R. 618.) Indiscriminate enrichment "would tend to confuse and mislead consumers by giving rise to conflicting claims regarding the beneficial effects" of the added ingredients "and would be likely to lead to the impression on the part of consumers that a single article of food so enriched would meet all nutritional needs." On the other hand, limited enrichment "is readily adapted to the promotion of consumer understanding of the relative value of enriched and natural foods". (R. 618.)

Upon the basis of the foregoing findings and other subsidiary findings, the Administrator concluded that it would "promote honesty and fair dealing in the interest of consumers" to adopt the standards of identity for farina and enriched farina embodied in Regulations 15.130 and 15.140 (R. 627, 637–638).

The court below set aside the regulations on the ground that the findings relating to consumer confusion were not supported by substantial evidence, and that the regulations exceeded the authority of the Administrator and were unreasonable (R. 679–689).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In setting aside Regulations 15.130 and 15.140 of the Federal Security Administrator fixing and establishing definitions and standards of identity for the foods "farina" and "enriched farina."

2. In holding that there was no evidence in support of the Administrator's finding that indiscriminate enrichment of farina with vitamins and minerals would tend to confuse and mislead consumers.

3. In holding that the Administrator was not entitled to consider such tendency to confuse and mislead in reaching the conclusion that it would promote honesty and fair dealing in the interest of consumers to promulgate the regulations under review.

4. In holding that the order was unreasonable in excluding vitamin D from "farina" and permitting it only in "enriched farina," in which vitamin B_1, riboflavin, nicotinic acid, and iron are required.

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* The court below also erred in setting aside all the wheat products standards in their entirety, although petitioner claimed to be adversely affected by the order only insofar as the farina and enriched farina standards prohibit the addition to farina of vitamin D unaccompanied by other vitamins and minerals, and did not challenge the regulations in any other respect. The formal judgment of the Circuit Court of Appeals (R. 689) sets aside "the order of the Federal Security Administrator entered on May 26, 1941." Literally this judgment invalidates the standards for flour, enriched flour, bromated flour, enriched bromated flour, durum

SUMMARY OF ARGUMENT

A. The Administrator's finding that indiscriminate enrichment of wheat products would confuse and mislead consumers is supported by substantial evidence. The science of vitamin nutrition is in its infancy; its terminology is new and difficult; and consumer comprehension of its limitations and prospects is rudimentary. These facts, coupled with the possibilities of relief from various diseases offered by this new science, make the field peculiarly susceptible to exploitation on the basis of half-truths and partial enrichments which will not fulfill the consumer's reasonable expectation of substantial contribution to his dietary requirements by "enriched" foods.

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flour, self-rising flour, enriched self-rising flour, phosphated flour, whole wheat flour, bromated whole wheat flour, whole durum wheat flour, crushed wheat, cracked wheat, and semolina, since standards for all of these products were included in the same order in which the farina and enriched farina regulations were also included. There was no controversy concerning these standards, and indeed, respondent has no such interest in them as would entitle it to judicial review of them. Further, the judgment on its face invalidates phases of the farina and enriched farina regulations, such as fineness of grind of farina and the option for disodium phosphate in enriched farina, about which respondent did not complain in its petition for review (R. 640-644). Since the court below accepted all findings of fact except those on the confusing and misleading of consumers (R. 681, 683), and its opinion concludes by holding that the "regulations in controversy" must be set aside (R. 689), the broad form of the actual judgment appears to be inadvertent and will not be argued herein. Plainly, the court's order went far beyond the scope of respondent's attack upon the regulations and beyond the issues which were before it.

The record shows a wide range of variation in existing manufacturing practice with regard to enrichment, both in the selection and quantities of vitamins and minerals added. Consumer representatives, scientists, industry technicians and government food and drug experts all testified that continuation of such indiscriminate enrichment would confuse and mislead consumers. The Administrator was plainly entitled to give weight to this expert testimony concerning the probable effect of present trends. The testimony cannot be dismissed simply because it is in part cast in terms of the future. In the issuance of regulations, it is normally necessary to make a judgment *in futuro;* the testimony which furnishes a basis for such a judgment does not thereby become "speculation" and "conjecture."

B. The likelihood that consumers will be confused and misled by unrestricted variation in nutritive supplementation of food justifies the promulgation of standards of identity which will bar some of the variants even though wholesome and accurately labelled. The history of administrative standards and of food and drug legislation prior to and including the Federal Food, Drug, and Cosmetic Act of 1938 makes it clear that Congress contemplated regulations under Section 401 which, in the interests of standardization, might prevent interstate traffic in wholesome nonfraudulent foods. The earliest food standards issued at the beginning

of this century by the Department of Agriculture excluded from the standardized articles all substances not mentioned in the definitions, without regard to the wholesomeness of the ingredients excluded. When Congress itself enacted a standard of identity for butter in the Butter Standard Act of 1923 it plainly evinced its intention to restrict the composition of butter to the ingredients named in the statute. The Food, Drug, and Cosmetic Act of 1938 carefully distinguishes between standards of identity which are intended to guarantee the "integrity of food products" and standards of quality where specific provision is made for sale of substandard articles under an informative label. The phrase "promote honesty and fair dealing," as used in Section 401, does not restrict identity standards to mere prohibitions of false labelling. On the contrary, the phrase is wholly consistent with exclusion of harmless ingredients, especially where, as here, the basis of consumer confusion is the existence of multiple variations. *Pacific States Box Co.* v. *White*, 296 U. S. 176, 181–182. And it is established that the test of preventing deception resulting from variations does not limit administrative authority to a requirement of label disclosure. *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, 484; cf. *United States* v. *95 Barrels Cider Vinegar*, 265 U. S. 438, 445.

C. If, as we submit, standards of identity may exclude harmless and disclosed ingredients, the only issue is whether the particular line drawn by the

Administrator is reasonable, not whether he may reasonably have drawn a different line. There was a reasonable basis for the Administrator's exclusion of vitamin D from the farina standard and for his requirement that enriched farina, in which vitamin D is permitted, must contain four other nutrients. The evidence shows that the four required ingredients of enriched farina are of great importance to the diet and that their deficiencies are widespread. It shows further that these four ingredients are originally contained in the whole wheat berry, and are naturally related to it, while vitamin D is not contained in the berry in appreciable quantities. The standards, therefore, are an accommodation to existing natural, dietary and historical phenomena, and are reasonable.

ARGUMENT

THE COURT BELOW ERRED IN SETTING ASIDE THE ADMINISTRATOR'S REGULATIONS SINCE THE FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE REGULATIONS WERE AUTHORIZED BY THE ACT AND WERE REASONABLE

Introductory.—Section 401 of the Federal Food, Drug, and Cosmetic Act of 1938 authorizes the Administrator to promulgate regulations fixing reasonable standards of identity for foods whenever in his judgment "such action will promote honesty and fair dealing in the interest of consumers." Finding that indiscriminate enrichment of farina with vitamins and minerals would tend to confuse

and mislead consumers and would impede rather than promote honesty and fair dealing in the interest of consumers, the Administrator issued regulations which fixed the standards of identity for "farina" and for "enriched farina."

The instant controversy arises from the Administrator's failure to include vitamin D as an ingredient in farina, and from his requirement that enriched farina, in which vitamin D is permitted, must include four other factors—vitamin B_1, riboflavin, nicotinic acid, and iron. Respondent, The Quaker Oats Company, has for a number of years manufactured and marketed a product which consists of farina plus vitamin D. Its position is that the regulations, to be valid, must provide that vitamin D may be added to farina and that since the farina standard does not permit this, while the enriched farina standard permits vitamin D only in combination with the other factors, both standards are void. Respondent's attack in the court below was grounded upon its allegations that the Administrator's findings were without substantial support in the evidence; that, under the Act's test of promotion of "honesty and fair dealing in the interest of consumers," the Administrator's authority extends only to the exclusion in his regulations of ingredients which are deleterious or undisclosed; and that his treatment of vitamin D was unreasonable. It is contended that the Administrator cannot take into considera-

tion the consumer confusion which inheres in multiple farina products with varying additions of vitamins and minerals; his discretion is at an end once he determnes that a factor is wholesome, for upon such determination, he must so shape his regulation as to permit the inclusion of that factor.

The court below agreed with respondent's contentions. The finding upon which the Administrator's determination initially hinges—that indiscriminate enrichment of these products tends to mislead and confuse consumers and that, accordingly, standards which exclude the enrichment (in the case of farina) or limit it to a *cluster* of factors (in the case of enriched farina) would promote honesty and fair dealing in the interest of consumers—was rejected as without substantial support. The court below held that harmless ingredients could not be excluded from a correctly labeled food and that, in any event, the tendency to mislead and confuse which the Administrator found to exist is not an element which he may consider since it is unrelated to the promotion of honesty and fair dealing in the interest of consumers. The requirement of honesty and fair dealing, in the court's view, is satisfied by truthful labe[illegible] at least as long as the variations are additional ingredients which are harmless. The regulations, therefore, must be sufficiently broad to permit a manufacturer to include any wholesome ingredient; if they do not, they are unauthorized and unreasonable.

It is our position, however, that the record supports, and the Act permits, the regulations under review, and that they are reasonable. The validity of the regulation turns at the outset upon the question whether the Administrator's finding, rejected by the court below, that indiscriminate enrichment would tend to confuse and mislead consumers, is supported by substantial evidence as required by Section 701 (f) (3) of the Act. We shall show in Point A that it is so supported both by the general evidence relating to enrichment and by specific expert testimony concerning the consequences of indiscriminate enrichment in this field. Second, the validity of the regulations turns upon whether the findings furnish a legal basis for the regulation. This depends on the question whether the Administrator, under the Congressional requirement embodied in Section 401, that his action promote "honesty and fair dealing" is entitled to consider the existence of a tendency to confuse and mislead consumers stemming from a multiplicity of products enriched in varying ways, or whether, on the other hand, such confusion is irrelevant under the Act and the requirement of honesty and fair dealing is satisfied by truthful labeling, so that the Administrator is without power to exclude nondeleterious ingredients from his definitions. We shall show in Point B that the Administrator's action in considering the evidence establishing confusion and misleading of consumers is consistent with and authorized by, the terms and the history

of the Act, and with the course of judicial decisions. In Point C, we shall show that the Administrator's treatment of vitamin D—excluding it from farina, and permitting its inclusion in enriched farina only in combination with other elements—is reasonable.

A. The Administrator's finding that indiscriminate enrichment of farina would tend to confuse and mislead consumers is supported by substantial evidence.

The Administrator is authorized by Section 401 of the Act to issue reasonable standards of identity for foods where in his judgment such action will promote honesty and fair dealing in the interest of consumers. A situation must, therefore, exist which in the Administrator's judgment warrants his action. The Administrator found that such a situation did exist, arising from the practice of indiscriminate enrichment of flour and farina which tended to confuse and mislead consumers. We submit that the court below was in error in holding that this basic finding was without substantial evidentiary support. Such support rests upon both the general testimony relating to the problem of food enrichment which itself gives rise to the inference that indiscriminate enrichment tends to confuse and mislead consumers, and upon direct expert testimony that such a tendency to confuse and mislead does in fact exist.

1. The problem with which the Administrator was faced in promulgating the instant standards

has its roots in the development of knowledge of vitamins and mineral factors. Research,—since widely publicized,—in the science of nutrition, principally within the present century, has discovered the importance of vitamin and mineral ingredients in diet, and the unhealthful effects of deficiencies of these ingredients.

While scientific knowledge in this field is not yet complete and certain, the importance of the vitamin and mineral ingredients which the Administrator included as required or optional in his standard of enriched farina is well established. Deficiency of vitamin B_1,[6] the first of the four ingredients required by the enriched farina standard, is the most widespread (R. 290–291, 411, 435): it is the cause of beriberi, and in less severe cases results in abnormal susceptibility to fatigue, nervous disorders, rheumatism, loss of appetite, or gastro-intestinal disorders (R. 51–52, 57–58, 108, 387, 408, 414).[7] Deficiency of riboflavin,[8] the second ingre-

[6] Vitamin B_1 is sometimes known as thiamin or thiamin chloride (R. 49, 380–381).

[7] This was the one vitamin universally recommended as proper for addition to wheat products and favored by most witnesses, including those representing the industry, as the one which should be a required ingredient (R. 263, 435, 442, 446, 475). The National Research Council has recommended B_1 for inclusion in our army specifications (R. 106), and in England there is a legal requirement that B_1 and calcium be added to flour (R. 46, 65, 129).

[8] Riboflavin is sometimes known as vitamin B_2 or G (R. 186).

dient required by the enriched farina standard, leads to abnormal susceptibility to fatigue and to vision disturbances (R. 108, 127). Deficiency of nicotinic acid,[9] the third required ingredient,[10] is the cause of pellagra (R. 51, 121, 369, 387–388). Iron, the fourth ingredient required by the enriched farina standard, is a red blood cell constituent, deficiency of which leads to anemia (R. 272–274, 284). Calcium, which is an optional ingredient included in enriched farina, has an important bone-building function; its deficiency causes rickets in children and other bone diseases in older people (R. 103, 272). Vitamin D, another optional ingredient and the only one which respondent adds to its farina, is important for the utilization of calcium, and vitamin D deficiency therefore may lead to the same results as calcium deficiency (R. 78, 81, 85, 103, 235).[11]

[9] Nicotinic acid is sometimes known as the antipellagra, or pellagra preventive factor (R. 64, 187, 379, 492).

[10] All three ingredients, plus certain other vitamins (but not including vitamin D) are sometimes referred to as the vitamin B complex (R. 108).

[11] Two additional optional ingredients are also allowed by the enriched farina standard. One, disodium phosphate, has no substantial nutritional significance, but is permitted because it facilitates quick cooking (R. 269; Finding 85, R. 626). The other, wheat germ, is nutritionally significant as a supplier of all four of the required factors of the standard, and is permitted in limited amounts because it may be less costly than artificial additions since it is itself a flour mill byproduct, and because it is a convenient carrier of artificial additions (R. 52, 57, 527; Finding 44, R. 619; Finding 82, R. 626).

Other nutritional elements, particularly vitamins A, B_6, C, and E, pantothenic acid, and phosphorus, were recom-

In addition, the evidence establishes the natural relationship to the basic farina product of the four factors which the Administrator's standard required as ingredients of enriched farina. The original whole wheat berry, the ultimate source of farina products, is rich in these four factors (B_1, riboflavin, nicotinic acid, and iron) (R. 120, 127–128), but a relatively poor source of the optional added enrichments (calcium and vitamin D) (R. 78–80, 144, 286, 298). In respect of these, milk is the ideal calcium source, while vitamin D, whose "natural" source is sunlight, is found in significant quantities only in cod liver and certain other fish oils (R. 79–80, 87, 91).

Although whole wheat is thus an excellent source of the four required factors of the enriched farina standard, contribution of these factors to the American dietary has been substantially decreasing in the last fifty years. This is due to an evolution both in dietary habits and in the process of manufacture. The per capita consumption of wheat has dropped by two-fifths since 1900, to a present average consumption of only one-fourth to one-third of the total caloric requirement, while the

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mended by witnesses as additional enrichments (R. 69, 73, 95–96, 439), but were not included either as required or optional. The state of knowledge as to the effects of vitamin E is limited, and as to vitamin A and C, it is known that even if naturally present or inserted into wheat products they would be largely destroyed by the cooking or baking process (R. 108–109, 120, 148, 185, 384, 413. Findings 41, 42, R. 619).

consumption of sugar, which contains neither vitamins nor minerals in significant quantities, has risen (R. 119, 183, 191, 247, 312, 367, 401, 416). In addition changing milling processes, developed in response to public demand for fine white products, have milled off the bran and germ, which are the principal vitamin and mineral-bearing constituents of the wheat berry. As a result there remain in flour and farina primarily the endosperm, the starchy portion of the berry which is leanest in these constituents." (R. 100–102, 118, 127, 276, 325–341, 525.) This abstraction of vitamin and mineral constituents from the wheat berry is particularly marked in the case of farina, which corresponds to a grade of flour known as "patent flour" and is almost entirely free of bran coat and germ (R. 206, 212–213, 625). As a result of the severe milling process to which farina is thus subjected, it has less than a tenth of the B[1] content of whole wheat, only a quarter of its riboflavin content; only two-thirds of its iron content; and there is also some reduction in nicotinic acid content[2] (R. 127–128, 272, 275–276, 278–279, 412).

These facts have led to the efforts of producers of flour and farina to compensate for the loss of important ingredients. There has been considerable

[1] See diagram of wheat kernel (R. 523).

[2] The amount of the nicotinic acid reduction is not stated. The record shows that techniques of measurement of nicotinic acid have not been perfected (R. 121, 361).

public knowledge of the deficiencies of flour and farina, and as a result consumers have "been more or less frightened away from the consumption of cereals" (R. 312). To counteract this the milling industry has in recent years been adding either natural or synthetic vitamin and mineral values to the milled products and has been engaged in commercial exploitation of these products as "enriched," "fortified," or "restored" (R. 107, 118, 128–130, 153–154, 231).

But these additions have taken place indiscriminately and with wide individual variations. Among flours, there was testimony concerning no less than six variations in nutritional [1] additions contained in existing products on the market. To one flour is added vitamin B_1, nicotinic acid, and calcium—a formula used by more than twenty mills (R. 46–47); to a second is added vitamin B_1, riboflavin, calcium and iron (R. 130); a third has added vitamin B_1, riboflavin, vitamin E and unspecified minerals (R. 73; cf. R. 276); a fourth includes vitamin B_1, calcium and iron (R. 161); to a fifth calcium is added (R. 197–199); and to a sixth, vitamin D is added (R. 75–77). A like variation in nutritional

[1] The constituents here enumerated are only those added for the purpose of supplying nutritional deficiencies. Incidental additions, such as the other mineral concomitants of the compounds used to add calcium and iron (R. 270, 272, 360, 440), and minerals added for special nonnutritional purposes such as quick-cooking and self-rising features, are omitted (R. 199–200, 263, 299).

additions exists" in the more limited field of farinas: Two farinas (including respondent's farina) (R. 77, 503) contain vitamin D; two or three add vitamin B_1 plus minerals (R. 268, 504); and two add vitamin B_1 (R. 503). And, as the Administrator found (R. 618), existing various represents only the beginning of a process of differentiation which will result in "a great increase in the diversity" (R. 118, 138, 161).

The effects upon consumers in their selection among the variously enriched foods, and their inability to make an informed choice, was expressly described by expert witnesses. Consumer representatives (R. 116, 165–171, 173–175, 488), disinterested scientists (R. 101–103, 104, 409), industry representatives (R. 147, 311–312), and federal food and drug experts (R. 177–178, 184) all testified that indiscriminate enrichment confuses and misleads consumers because of their inadequate knowledge of the nomenclatures and functions of the several vitamins and minerals involved in dietary deficiency; or that a minimum uniformity in the content of the enriched product was necessary to assure the consumer, buying on the assumption of dietary efficacy, that there would be such efficacy.

Thus a scientist who is a pioneer in vitamin research and education (R. 407) testified (R. 413)

[10] The farina information comes from two sources which may overlap in part, a mill survey tabulation exhibit, and the direct testimony (R. 24–28, 503–504); hence the alternate numbers given for certain types of farinas.

that "* * * if there is a great diversity of products sold under a great diversity of names and with a great diversity of formulas, then the public is going to be merely confused by the changes". A witness from the Bureau of Home Economics of the Department of Agriculture, reporting the joint views of a group of nutritionists in the Bureau who are engaged in advising consumers on food selection problems (R. 175–176), testified (R. 177):

> Any standard for white flour that allows the optional addition of one or a dozen of these nutrients would not promote honesty and fair dealing in the interests of the consumer. Such a standard would tend to confuse consumers and the fortified product might seem to them to be a short cut to a balanced diet. * * * Most nutritionists would oppose creating a standard for a multiplicity of kinds of supplemented flours, each of which was unstandardized and independent of all the rest. It would lead to advertising abuses; advertising claims would tend to be accepted too credulously by some and rather completely discounted by others. * * *."[6]

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[6] Compare the testimony of two consumer witnesses who emphasized the importance of some assurance to the consumer that a definite expectation of nutritional value will be fulfilled:

"* * * an identity or definition for flour should describe it and limit it in such a way that you can always depend on being able to use it for the purpose that you have in mind."

Underlying such testimony against optional indiscriminate variation as failing to comport with what the consumer "will know" (R. 147) or will "recognize" (R. 177), or with what is necessary as "a guide in buying" (R. 170), or "being able to use it for the purpose that you have in mind" (R. 174) is the judgment concerning the consumer's ability to discriminate and the inadequacy of label disclosure as a guide for discrimination. This judgment is particularly explicit in the testimony of two of the witnesses, both of them professionally in contact with consumer reactions. Thus a member of the technical staff of Consumers Union of the United States, a nonprofit testing and information organization serving 80,000 consumer members (R. 487–488), endorsed the principle

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"Now, the difficulty with getting a wide proposal would be that if you could have flour without additional calcium and vitamins and so on, it will behave one way in feeding your family, and if you can have flour that may have vitamins and no calcium, it will do something else, and if you can have flour that will supply maybe as much as half of the calcium you need, and no vitamins it is very different still, so that you get many different products." (R. 174–175.)

"We realize that if standards are set limitations are put on, that certain flour will be excluded, and of course as consumers we do not want arbitrary definitions that make the price of the commodity go up considerably, yet we recognize that definitions have to be exclusive or else they are no good at all, * * *.

"All that the consumer can say to help guide you in this decision is that we feel that the definition should not be broadened, because it would make the standard of identity of less value to us as a guide in buying." (R. 170; see also passim, R. 165–171.)

embodied in the enriched farina standard, i. e., required multiple enrichment at least to whole wheat levels under a single name, but with optional added ingredients including vitamin D (R. 489–490, 496), stressing the danger that anything less "tends to cause a false sense of security when it is coupled as it so frequently is, with rather dubious advertising claims" (R. 488). This witness emphasized the state of partial public digestion of scientific information on nutrition; she testified that (R. 492) "the average consumer is in a truly difficult position. He is just beginning to learn one set of names, and tying them up with functions and requirements. All possible efforts should we feel be made to keep his job as easy as possible." [17]

This evidence relating both to the facts of enrichment and to the resulting tendency to confuse and mislead consumers furnished substantial support to the Administrator's findings (R. 617–618) that such a tendency exists. Although the court below rejected this testimony as "speculative and conjectural" (R. 686), the Administrator was plainly entitled to give it weight. In so far as the testi-

[17] See also the testimony of Dr. Robert S. Harris that (R. 311):

"* * * I believe that we are trying to apprise the consumer thinking the consumer is a home economist, or someone of that training, and not thinking of the consumer as being a person of rather poor education, of little realization of all of these nutritional things, and by telling how many units there are or perhaps even what proportion those units are of the day's requirements, I am afraid that lots of people that I know will miss the point; * * *."

mony summarized above related to ascertainable facts—the fact of the existence of a multiplicity of enrichments, the fact of general consumer ignorance of the kinds, quantities and combinations of nutrients which he should find in foods, the fact of advertising claims based upon the varying additions—there was no element of speculation or conjecture. These facts alone posed the problem and reasonably supported the inference, which was within the Administrator's special administrative competence to draw, that consumers would be confused and misled by indiscriminate enrichment.

Nor was the Administrator required to disregard the impressive consensus of the testimony directly establishing the tendency toward confusion and misleading of consumers merely because the opinions of necessity dealt with probable future effects of present trends. Whatever the admissibility and probative value of such testimony in administrative *adjudicatory* proceedings which deal with ascertainment of past facts, evidence of this nature is clearly competent in administrative *rule-making* proceedings.[18] Cf. *Final Report of*

[18] Respondent did not object to this testimony and did not except to the Administrator's proposed findings relating to confusion, although it was identical to the final findings here under review (R. 575–576, 598–604, 618). Thus, in any event, respondent would seem to be foreclosed from pressing objections to this evidence at this stage. *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 155; *Spiller v. Atchison, T. & S. F. Ry.*, 253 U. S. 117, 130; *Rowland v. St. Louis and S. F. R. Co.*, 244 U. S. 106, 108.

the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong, 1st sess., p. 109. Rule-making is the administrative performance of legislative functions and operates *in futuro.* The terms of Section 401 expressly require the Administrator to make a judgment *in futuro,* that standardization *"will"* promote honesty and fair dealing in the interest of consumers; plainly the testimony of these witnesses which the court below rejected is the very type upon which legislators are accustomed to rely in legislative hearings. At least in rule making, therefore, the evidence meets the test of possessing "rational probative force." Cf. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229-230.

Nor is the absence of proof that the respondent's product has in itself been in the past the subject of "deception, fraud, or misrepresentation of any kind" fatal, as the court below thought (R. 683), to the Administrator's finding that indiscriminate enrichment would confuse and mislead. The purport of this finding is not that individual manufacturers have been perpetrating common law frauds, but that the total effect of many manufacturers engaging in indiscriminate partial enrichments would be confusing and misleading whatever the honesty of each manufacturer be. Even in *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, cited by the court below as supporting its view that the instant findings as to confusion were mere specula-

tion and conjecture (R. 686), this Court, in pointing out that the Federal Trade Act required proof rather than conjecture as to the injurious effect on competition, stated that (p. 651)—

> * * * it is not necessary that the facts point to any particular trader or traders. It is enough that there be present or *potential* substantial competition, which is shown by proof, *or appears by necessary inference,* to have been injured, *or to be clearly threatened with injury,* to a substantial extent, by the use of the unfair methods complained of. [Italics supplied.]

See also *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 151–152; *Electro Thermal Co.* v. *Federal Trade Commission,* 91 F. (2d) 477, 480 (C. C. A. 9), certiorari denied, 302 U. S. 748.[19]

We submit, therefore, that the finding of the Administrator that indiscriminate enrichment of farina would tend to mislead and confuse consumers was supported by substantial evidence, was a finding within his special administrative competence, and was, therefore, conclusive.

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[19] The same test of likelihood rather than actuality is used in the trade-mark and false advertising cases where consumer confusion is as here the very issue. *McLean* v. *Fleming*, 96 U. S. 245, 251; *United Drug Company* v. *Obear-Nester Glass Company*, 111 F. (2d) 997, 999–1000 (C. C. A. 8), certiorari denied, 311 U. S. 665; *Charles Broadway Rouss, Inc.* v. *Winchester Co.*, 300 Fed. 706, 723–724 (C. C. A. 2), certiorari denied, 266 U. S. 607.

B. Where there is a tendency toward consumer confusion, the Administrator may promulgate standards of identity which exclude variants even if wholesome and properly labeled

We have shown in the preceding point that the Administrator's finding that indiscriminate enrichment of farina would tend to confuse and mislead consumers is supported by substantial evidence and must, therefore, be accepted. But the court below held that, in any event, the Act does not authorize standards which exclude harmless ingredients disclosed by the manufacturer, and that even if it did the existence of a tendency to confuse and mislead is not a relevant consideration in the promulgation of standards of identity.

We submit that this conclusion is negated both by the text and the legislative history of the Act, and that standards of identity are not restricted by the tests of "honesty and fair dealing in the interest of consumers" to mere protection against false labeling.

1. *The text and history*[20] *of the Act.*—Section 401 of the Act authorizes the Administrator to fix and establish "a reasonable definition and standard of identity" when such action will in his judgment promote honesty and fair dealing in the interest of consumers. It is our position that these words

[20] We shall consider the question initially apart from an examination of the meaning of the words "honesty and fair dealing in the interest of consumers." In the second portion of this point (*infra*, pp. 45–52) we shall show that this clause,

authorize the Administrator to issue a definition and standard of identity which limits the composition of the defined food to ingredients specified in the definition, regardless of label disclosures and wholesomeness of proposed variants. The effect of the decision below, however, is to require every definition and standard to include a blanket clause permitting any nondeleterious variation which is disclosed by labeling.[21]

The terms of Section 401 are not consonant with this interpretation. To "define" is—

> To mark the limits of; to determine with precision or to exhibit clearly the boundaries of; as, to *define* the extent of a kingdom; to make distinct or fix in outline or character. *Webster's New International Dictionary.*

This is the sense in which courts have used the word in other contexts. *State* v. *Gardner*, 151 La.

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far from restricting the Administrator's authority, itself reinforces the conclusion that the Administrator may exclude wholesome ingredients in a standard of identity.

[21] Perhaps the decision goes even further than stated in the text. The court said: "the truth as to a food for which a standard has been fixed permits it to escape the indictment of being misbranded." (R. 685.) This seems to mean that even if the definition and standard need not contain a blanket variation clause, departures from the standard are permissible if disclosed by labeling. This is contrary to Section 403 (g) (21 U. S. C., Sec. 343 (g)) which provides that a food for which a standard has been adopted shall be deemed misbranded "unless it conforms to such definition and standard." Respondent has not maintained that standards were not exclusive under Section 403 (g), but only that the standards should be so phrased as to include his particular product.

874, 878, 92 So. 368, 370 (1922); *West Branch Novelty Co.* v. *Bloom*, 31 F. Supp. 673, 679 (E. D. Pa.). A "standard" is—

> That which is established by authority, custom, or general consent, as a model or example; criterion; test; in general, a definite level, degree, material, character, quality, or the like, viewed as that which is proper and adequate for a given purpose. *Webster's New International Dictionary*

That standards of identity are expected to put a definite limit upon the composition of foods is reinforced by the language of Section 401 dealing with optional ingredients:

> * * * In prescribing a definition and standard of identity for any food or class of food in which optional ingredients *are permitted*, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. * * * [Italics supplied.]

Plainly, this contingent and permissive language contemplates cases in which optional ingredients will not be permitted at all; unless this is so, the clause is without meaning. This is borne out further by the form of Section 302 (g) of S. 5 (74th Cong., 1st Sess.), the predecessor of Section 403 (g) of the Act; it provided that a food should be deemed misbranded if

its label fails to bear * * * if so required by such regulations *when such definition and standard permits optional ingredients* * * * the common names of such optional ingredients as are present in such food. S. 5, 74th Cong., 1st Sess., Sec. 302 (g) (Dunn, 194)." [Italics supplied.]

This *power* to permit optional ingredients cannot be construed as an *obligation* to permit any disclosed non-deleterious addition, or, in other words, to exclude only deleterious or concealed ingredients, for to do so renders identity standards nugatory. Deleterious ingredients would in any event be barred by Section 402 which prohibits adulteration, and disclosure of ingredients of non-standardized foods is required by Section 403 (i). Indeed, if the narrow view of the function of identity standards were adopted, the only effect of promulgation of such standards, after elaborate hearings and review (*supra*, pp. 3–4), would be to relax disclosure requirements, since required ingredients of a standardized food and optional ingredients not specifically designated by the Administrator to be

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[11] The documents of the legislative history of the Act are collected in Dunn, *Federal Food, Drug, and Cosmetic Act* (1938), which appears to be complete except for hearings, from which only excerpts are given. Passages appearing in Dunn are herein cited "Dunn, —." On the relationship between the several bills leading to the present Act, Cavers, *The Food, Drug, and Cosmetic Act of 1938: its Legislative History and its Substantive Provisions*, 6 Law & Contemp. Prob. 2.

named on the label need not be disclosed. Sections 401 and 403 (g).

In addition, the contrasting treatment of labelling in connection with *identity* standards on the one hand and *quality* standards on the other confirms the conclusion that labeling was not intended to offer an escape from conforming to the definition of foods in standards of identity. As has been noted, Section 403 (g) requires a food purporting to be or represented as the food for which a definition and standard of *identity* has been prescribed to conform "to such definition and standard." In contrast, Section 403 (h) requires only that the food be labeled substandard if it fails to comply with *quality* standards fixed by the Administrator.[23] This distinction stems from a similar differentiation previously made by Congress between a standard of identity for butter[24] and the quality standards provided for certain canned foods by the McNary-Mapes Amendment to the Food and Drugs Act of 1906.[25] In the Butter Standard Act no

[23] In Section 501 (b) (21 U. S. C., Sec. 351 (b)), relating to drug standards, where departures from the standards are contemplated, provision is expressly made for such departures with appropriate label declarations.

[24] The Butter Standard Act of 1923, 42 Stat. 1500, 21 U. S. C. Section 321a. See discussion, *infra*, p. 42.

[25] Act of July 8, 1930, 46 Stat. 1019. The amendment added to the categories of misbranding in Section 8 of the 1906 Act the following:

[An article should be deemed to be misbranded . . . in the case of food:]

"Fifth. If it be canned food and falls below the standard of quality, condition, and/or fill of container, promulgated

provision is made for variations or for labeling of variations. In the McNary-Mapes Amendment, however, express provision is made for the sale of canned goods which are substandard in quality, conditioned upon an informative label statement. The distinction is emphasized in the committee reports on the bill which became the 1938 Food, Drug, and Cosmetic Act, listing the several effects of the new provisions:

> Definitions and standards of *identity* are provided under which the *integrity of food products* can be effectively maintained.
>
> *Informative labeling of foods as to quality and composition* is required for the information and guidance of consumers. Emphasis is placed on the informative labeling of special dietary food, such as that for infants and invalids. H. Rep. No. 2139, 75th Cong., 3rd Sess., p. 2 (Dunn, 816). See also H. Rep. No. 2755, 74th Cong., 2d Sess., p. 4 (Dunn, 553). [Italics supplied.]

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by the Secretary of Agriculture for such canned food and its package or label does not bear a plain and conspicuous statement prescribed by the Secretary of Agriculture indicating that such canned food falls below such standard. * * * The Secretary of Agriculture is authorized to determine, establish, and promulgate, from time to time, a reasonable standard of quality, condition, and/or fill of container for each class of canned food as will, in his judgment, promote honesty and fair dealing in the interest of the consumer; and he is authorized to alter or modify such standard from time to time as, in his judgment, honesty and fair dealing in the interest of the consumer may require. The Secretary of Agriculture is further authorized to prescribe and promulgate from time to time the form of statement which must

The maintenance of the integrity of a food product patently deals with the food itself, not its labeling.

The purpose of the enactment of Section 401, as revealed in its legislative history, also indicates that definitions and standards of identity were intended to be exclusionary. The principal reason urged in favor of identity standards was to dispense with the necessity of proving, in every case where adulteration or misbranding was charged, that the proper composition of the food involved was that which the government claimed.[26] For example,

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appear in a plain and conspicuous manner on each package or label of canned food which falls below the standard promulgated by him, and which will indicate that such canned food falls below such standard, and he is authorized to alter or modify such form of statement, from time to time, as in his judgment may be necessary. * * * Nothing in this paragraph shall be construed to authorize the manufacture, sale, shipment, or transportation of adulterated or misbranded foods."

[26] The Annual Report of the Food and Drug Administration for the fiscal year ending June 30, 1933, included the following statement with reference to the identity standard provisions of S. 1944, 73rd Cong., which had just been introduced:

"The present law gives the Department of Agriculture no authority to establish legal standards for food products, except in the limited field of canned foods. The food standards announced by the Department are wholly advisory in character and compliance is a voluntary matter on the part of the manufacturer. Such advisory standards are based upon the consensus of consumer understanding and upon good manufacturing practice. To prove that a product sold within the jurisdiction of the Food and Drugs Act and that fails to comply with the advisory standard is adulterated or misbranded, it is necessary for the Department to present to the court and jury convincing evidence that the advisory

Section 402 (a) (1) of the Act provides that a food shall be deemed adulterated if it contains "any poisonous or deleterious substance which may render it injurious to health," with a qualification in case the substance "is not an added substance." Section 402 (a) (2) deals with "added poisonous or added deleterious" substances. Section 402 (b) covers adulteration by abstraction of valuable constituents or substitution of substances or additions which make the food appear better or of greater value than it is. As was stated in Senate Committee reports:

> These provisions in themselves imply the existence of definitions and standards of identity, since no one can tell when an article is adulterated under them without first determining definitely what constitutes

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standard does represent the actual composition of the product expected by the consumer and recognized by the majority of the trade. Proof that the food on trial does not meet the advisory standard is of no avail unless the validity of the standard is first established. This imposes a double burden of proof upon the Government as well as the expense of bringing into court trade and consumer witnesses who are prepared to testify that the advisory standard accurately represents the material in question. It has long been recognized that this necessity imposes a handicap of undue proportions upon the Government and that the lack of legal standards is a distinct disadvantage to ethical manufacturers who are forced to compete with products which differ from the advisory standards. The establishment of food standards having the force and effect of law will vastly simplify the problem of enforcement and will unquestionably be of great advantage to the consuming public and to the manufacturer of legal products."

the unadulterated product. S. Rep. No. 493, 73rd Cong., 2d Sess., p. 10 (Dunn, p. 119); S. Rep. No. 361, 74th Cong., 1st Sess., p. 10 (Dunn, p. 245).

But if standards do not exclude ingredients it would still remain necessary in every case to prove that the product in question differs from some norm established by the customs of housewives or trade practice, since the "standard" itself would necessarily be so inclusive that it would not fix a norm but would permit the addition of an unlimited number of "added substances." In each case a showing would be required not only that the disputed ingredient is injurious to health or makes the product appear better or of a greater value than it is, but also that it is an "added substance", i. e., not one properly or usually included in a food of this category.

The difficulties intended to be eliminated by the identity standards provisions of Section 401 are illustrated by *United States* v. *Ten Cases, More or Less, Bred Spred*, 49 F. (2d) 87 (C. C. A. 8) [27] in

[27] Two other Bred Spred cases also figure in the legislative history. They are *United States* v. *Fifteen Cases of Bred Spred*, 35 F. (2d) 183 (C. C. A. 7), in which the Government was held estopped by the judgment in *United States* v. *49½ Cases of Bred Spred* (E. D. Mich.), reported in U. S. Dept. of Agriculture, *Decisions under The Pure Food and Drugs Act* (1934), p. 1201. This last case construed the distinctive-name proviso of Section 8 of the Act, 34 Stat. 768–771, 21 U. S. C. (1934 ed) sec. 10, as exempting any food sold under a distinctive name from compliance with all the misbranding and adulteration provisions of the old Act unless it actually

which the Government libelled under the 1906 Act a product sold under the name "Bred Spred." This product resembled jam but contained only half the normal fruit content, as measured by trade and household practice. It sold for a price only slightly less than jam. The Court held that the product was neither adulterated nor misbranded:

> * * * The mere fact that the product contained fewer strawberries than some other product, e. g., jam, does not show that Bred Spred was inferior to jam; nor does it show that a comparison with jam was called for by the statute unless Bred Spred was being palmed off on the public as jam. No showing of this kind was made.

The House Committee on Interstate and Foreign Commerce referred to this decision as justifying the necessity of standards of identity. The patent intent to render the *Bred Spred* decision obsolete through the effect of the identity standard provisions makes it clear that the Act gives the Adminis-

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contained additions of poisonous or deleterious ingredients. The Chief of the Food and Drug Administration referred several times to the latter *Bred Spred* cases in his testimony in support of the deletion of the old distinctive-name clause from the new bills, Hearings, Subcommittee of S. Committee on Commerce, S. 1944, 73rd Cong., 2d Sess., p. 14 (Dunn, 1052); Hearings, S. Committee on Commerce, S. 2800, 73rd Cong., 2d Sess., p. 512 (Dunn, 1123); Hearings, Subcommittee of H. Committee on Interstate and Foreign Commerce, H. R. 6906, H. R. 8863, H. R. 8941, and S. 5, 74th Cong., 1st Sess., pp. 45–55 (Dunn, 1237–1246). Only at the last-cited passages are the identity-standard point and the distinctive-name point both under direct discussion.

trator greater authority than the court below attributed to him. For if the standard of identity authorized by Section 401 were limited in its scope as required by the court below, such products as Bred Spred would be immune since, though not comporting with normal standards, they nevertheless are honestly labeled and nondeleterious. This is precisely the result intended by Congress to be avoided.[28]

The history of standard making lends further support to the view that standards were intended to be exclusionary. The Food and Drug Administration began issuing food standards in 1903 under a congressional appropriation authorizing the Secretary of Agriculture—

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[28] H. Rep. No. 2139, 75th Cong., 3rd Sess., p. 5 (Dunn, 819).

"Section 401 provides much needed authority for the establishment of definitions and standards of identity and reasonable standards of quality and fill of container for food. One great weakness in the present food and drugs law is the absence of authoritative definitions and standards of identity except in the case of butter and some canned foods. The Government repeatedly has had difficulty in holding such articles as commercial jams and preserves and many other foods to the time-honored standards employed by housewives and reputable manufacturers. The housewife makes preserves by using equal parts of fruit and sugar. The fruit is the expensive ingredient, and there has been a tendency on the part of some manufacturers to use less and less fruit and more and more sugar.

"The Government has recently lost several cases where such stretching in fruit was involved because the courts held that the well-established standard of the home, followed also by the great bulk of manufacturers, is not legally binding under existing law. * * *"

> to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various States and of the courts of justice * * *. Act of June 3, 1902, 32 Stat. 286, 296.

The first such standards were prefaced by a statement of "Principles on which the Definitions and Standards are Based." The list of principles included:

> 3. The definitions are so framed as to exclude from the articles defined substances not included in the definitions.[29]

The advisory standards were, however, not generally regarded by the federal courts as binding upon them[30] and it therefore became a principal pur-

[29] U. S. Department of Agriculture, Circular No. 10, Standards of Purity for Food Products (1903) p. 3. A similar statement appears in the successive revisions of the standards pamphlet. Circular No. 13 (1904) p. 3; Circular No. 19 (1906) p. 4; U. S. Department of Agriculture, Service and Regulatory Announcements, Definitions and Standards for Food Products (1927), revised and reissued 1928, 1931, 1932, 1933, 1936) p. 1. Farina first appears in the 1928 revision, p. 8: "Farina is the purified middlings of hard wheat other than durum".

[30] *United States* v. *One Hundred Barrels of Vinegar*, 188 Fed. 471 (D. Minn.); *United States* v. *W. B. Wood Mfg. Co.*, (E. D. Mo.), reported in *Decisions of Courts in Cases under the Federal Food and Drugs Act* (1954) 1002, 1003, affirmed on other grounds, 292 Fed. 133 (C. C. A. 8); but cf. *United States* v. *Frank*, 189 Fed. 195 (S. D. Ohio). The advisory standards were, however, adopted as legal standards by a number of State legislatures, e. g., California, G. L. 1923, Act 57, sec. 3, sustained in *Cleveland Macaroni Co.* v. *State Board of Health*, 256 Fed. 376 (N. D. Calif.).

pose of legislation in this field subsequent to the 1906 Food and Drug Act to give legal sanction to the standards promulgated by the Food and Drug Administration. It is significant that none of these advisory standards included a blanket clause permitting the addition of ingredients simply because they were nondeleterious and disclosed by labeling.

Nor did Congress include such a blanket clause for optional ingredients when it enacted a definition and standard of identity for butter in 1923. The Butter Standard Act was entitled "An Act To define butter and provide a standard therefor," and provided:

> for the purposes of the Food and Drug Act of June 30, 1906 (34 Stat. 768), "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter, and containing not less than 80 per centum by weight of milk fat, all tolerances having been allowed for. (42 Stat. 1500 (21 U. S. C., Sec. 321a).)

In commenting on the bill the Chairman of the House Committee said:

> The only things you can put into [butter] are salt, casein, the butter fat, and water. That is what the definition provides.[31]

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[31] Hearings, H. Committee on Agriculture on H. R. 12053, 67th Cong., 2d Sess., p. 24; see also H. Rep. No. 1141, 67th Cong., 2d Sess., p. 4.

Clearly, other healthful ingredients are excluded from the standard for butter. In describing the operation of the Butter Act to the congressional committees which were considering the identity-standard provisions of the 1938 Food, Drug, and Cosmetic Act, the Chief of the Food and Drug Administration pointed out the enforcement advantages of exclusionary standards, and characterized them as standards of production and manufacturing practice, not labeling standards.[32] Thus plainly the butter standard legislation, exemplar of the standards of identity provided for by Section 401, makes no provision for variations contingent upon labeling.

A final indication of understanding that standards of identity might condemn wholesome non-

[32] "Prior to the passage of the measure amending the Food and Drugs Act by requiring that butter contain not less than 80 percent fat, the condition was chaotic. Butter was produced and sold which varied from 75 to 85 percent fat. In the absence of power to standardize its production, the public was victimized not only, but the unbridled competitive situation was rapidly bringing about a condition of trade demoralization. Since the establishment of the legislative standard, enforcement operations have been simplified, manufacturing practices have been standardized, and, most important of all, the public has been effectively protected." Hearings, Subcommittee of S. Committee on Commerce, 74th Cong., 1st Sess., S. 5, p. 359 (Dunn, 1231). See also Hearings, Subcommittee of S. Committee on Commerce, 73d Cong., 2d Sess., S. 1944, p. 21 (Dunn, 1059), and Hearings, Subcommittee of H. Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., H. R. 6906, H. R. 8805, H. R. 8941, S. 5, p. 51 (Dunn, 1242).

conforming foods, without benefit of reprieve by label disclosure, appears from the legislative history of the provisions relating to standardization of fruits, vegetables, and cheese. The almost complete exemption of fruits and vegetables[23] from the Administrator's power to standardize had its genesis in the fear of apple and pear growers that identity standards for these fruits could, in the absence of specific exemption, be so set in terms of sugar, acid, and solid-content that entirely wholesome products of certain regions could not fall within the standards and would thus be excluded from the national market. 79 Cong. Rec. 4861–4862, 4905–4906 (Dunn, 324–326). It was assumed by proponents of the exemption and presumably by Congress which granted the exemption that a standard of identity for apples might be such as to exclude sound, nondeleterious apples not mislabeled in any way. Conversely, when it was proposed to eliminate cheese from the standard making power, a representative who opposed the cheese exemption expressly recognized that given definitions and standards of identity "we could not have certain

[23] "SEC. 401 * * * *Provided*, That no definition and standard of identity and no standard of quality shall be established for fresh or dried fruits, fresh or dried vegetables, or butter, except that definitions and standards of identity may be established for avocadoes, cantaloupes, citrus fruits, and melons. * * * Any definition and standard of identity prescribed by the Administrator for avocadoes, cantaloupes, citrus fruits, or melons shall relate only to maturity and to the effects of freezing."

types of cheese." 83 Cong. Rec. 7795 (Dunn, 865); yet the power to standardize cheese was restored. 83 Cong. Rec. 7795, 7902 (Dunn, 905, 961).

2. *The effect of the clause "honesty and fair dealing in the interest of consumers."*—We submit therefore that the terms and history of Section 401 establish that the Administrator was entrusted with authority to issue standards of identity which were not required to include every wholesome variant included by any manufacturer in the field. This conclusion would seem to be necessary if the regulation is to be a "standard of identity" within the ordinary import of those words. And similarly, the conclusion would seem to be inherent in the clause "honesty and fair dealing in the interest of consumers" if those words are to be given substantial meaning. The promulgation of a standard of identity to promote honesty and fair dealing in the interest of consumers is, we submit, particularly appropriate in a field where, as here, there are multiple variations in any class of important food to an extent that the consumer is confused and misled. For where there is consumer confusion, a standard of identity to minimize such confusion would seem plainly to be action to promote honesty and fair dealing in his behalf. And the goal of minimizing confusion and promoting honesty and fair dealing would scarcely be advanced by a "standard of identity," if such it could be called, which was required to be drawn so comprehensively that every wholesome variant were permitted to be included.

The court below, however, found in the phrase "honesty and fair dealing in the interest of consumers" not confirmation of this conclusion, but a restriction upon the Administrator's authority. Confusion of consumers, in the court's view, was as a matter of law irrelevant to the promotion of honesty and fair dealing. Whatever effect this interpretation gives to the word "honesty," it accords no substance to "fair dealing." And it is contrary to well established judicial interpretation of the statutory phrase.

The scope of the concept "honesty and fair dealing" has received judicial consideration primarily in cases involving protection of businessmen and the public against unfair competitive practices. In this field it is well settled that injunctive relief may be had on proof that defendant's conduct tends to deceive the public; it is unnecessary to show actual deception[14] or fraudulent intent.[15] "Confusion" of the public resulting from "deliberate or unintentional simulation" is regarded as equivalent to deception.[16] And misleading first impressions de-

[14] *McLean* v. *Fleming*, 96 U. S. 245, 251; *Rosenberg Bros. & Co.* v. *Elliott*, 7 F. (2d) 962, 966–967 (C. C. A. 3); *Charles Broadway Rouss, Inc.* v. *Winchester Co.*, 300 Fed. 706, 724 (C. C. A. 2), certiorari denied, 266 U. S. 607. For the phrase "honesty and fair dealing," see the *Rosenberg* case, and discussion in Nims, *The Law of Unfair Competition and Trade Marks* (3d ed., 1929), pp. 26–27.

[15] *Straus* v. *Notaseme Hosiery Co.*, 240 U. S. 179, 182; *Coty, Inc.* v. *Parfums de Grande Luxe*, 298 Fed. 865, 869–871 (C. C. A. 2).

[16] *Henry Maish Co.* v. *Farm Craft Foods*, 37 F. Supp. 1013, 1015 (E. D. N. Y.); see also *United Drug Company* v. *Obear-Nester Glass Company*, 111 F. (2d) 997, 1000 (C. C. A. 8), certiorari denied, 311 U. S. 665; *Florence Manufacturing Co.* v. *Dowd & Co.*, 178 Fed. 73, 75–76 (C. C. A. 2).

rived from labeling will justify judicial relief, however accurate the literal statement."

Any doubt concerning the applicability of these principles to food standardization for the promotion of "honesty and fair dealing" is settled by the decision of this court in *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, in which this Court refused to disturb a determination of the Secretary of Agriculture under the Meat Inspection Act,[11] that it would be deceptive to label as "sausage" an article containing more than 2 per cent cereal, even with qualifying words showing the presence of cereal in excess of 2 percent. The Meat Inspection Act provided that "no such meat or meat food products shall be sold or offered for sale * * * under any false or deceptive name" and authorized the Secretary to make rules and regulations necessary for the efficient enforcement of the Act. (21 U. S. C., Secs. 75, 89). The Court stated (249 U. S. at p. 487):

> * * * we cannot say that it was an abuse of discretion to prohibit the use of the word "sausage" as applied to it, rather than to prescribe qualifying terms explanatory of

[11] *See United States* v. *Ten Barrels of Vinegar*, 186 Fed. 309 (E. D. Wis.); *Heusner & Son* v. *Federal Trade Commission*, 106 F. (2d) 596 (C. C. A. 3). In the *Heusner* case the court refused to modify an order that petitioner cease and desist from using the word Havana on cigars not made in Cuba, by permitting such use with the qualifying words "Notice. These Cigars are made in the United States and only of United States tobacco."

[11] 21 U. S. C., Sec. 71.

it. Few purchasers read long labels, many cannot read them at all, and the act of Congress having committed to the head of the department, constantly dealing with such matters, the discretion to determine as to whether the use of the word "sausage" in a label would be false and deceptive or not, under such circumstances as we have here, this court will not review, and the Circuit Court of Appeals should not have reviewed and reversed the decision of the Secretary of Agriculture.

See also *United States* v. *95 Barrels Cider Vinegar*, 265 U. S. 438, 442–443.

It will be noted that the *Houston* case, like the instant case, turned not on any question of unwholesomeness, but upon the question whether a requirement of label disclosure is the outermost reach of an administrative power to prevent deception resulting from variations in the product.*

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* The Circuit Court of Appeals for the Eighth Circuit, whose construction of the statute was reversed by the Supreme Court, had fallen into precisely the error of the court below in the instant case, as is apparent from the language, below at an earlier stage of the case, *St. Louis Independent Packing Co.* v. *Houston*, 215 Fed. 553, 560, 561, (treated as the law of the case in the judgment which the Supreme Court reversed, *St. Louis Independent Packing Co.* v. *Houston*, 242 Fed. 337):

"* * * The subdivision in question prohibits a sale under any false and deceptive name and such it probably would be to sell a combination of sausage and cereal under the name of sausage, but not under the name of sausage and cereal. * * * The question is simply: Could he prohibit the making of a compound which was sound, healthful, wholesome, and free

The use of variant partial enrichments which the public is unable to identify by label so as to make an intelligent choice, and in its ignorance assumes to be "a short-cut to a balanced diet" (R. 177), constitutes a disappointment of public expectation as effective as the dilution by addition of substantial quantities of cereal to a sausage which the public in its ignorance assumes to be completely sausage.

The term "honesty and fair dealing in the interest of consumers" is at least as inclusive as the words "false and deceptive" which were the test of the Secretary's action under the Meat Inspection Act.

If, as we have shown, confusion facilitates deception of the public and is therefore inconsistent with honesty and fair dealing, and if labelling may be an insufficient protection against confusion, it is plain that standardization, i. e., exclusion of some of the variables which would confuse and be confused by the public, is an effective method of promoting honesty and fair dealing. This Court expressly sanctioned such a rationale for standardization in *Pacific States Box Co.* v. *White*, 296 U. S. 176, 181–182, in which state regulations

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from dyes, chemicals, preservatives, or ingredients which render such unfit for human food by a mere regulation? We are constrained to say that he cannot. 'A compound of beef and pork would not entitle the Secretary of Agriculture to prohibt the words "beef" and "pork" to appear in the title and to condemn all such compounds on the label of which they appear."

fixing the form and dimensions of containers were upheld. This Court in effect took judicial notice of the deceptive effect of unrestricted variations. Speaking for the Court, Mr. Justice Brandeis pointed out that the power to prescribe standard containers "to protect buyers from deception" was unchallenged, and that "obviously, a multitude of shapes and sizes of packages tends to confuse the buyer" (p. 181). Accordingly the Court refused to interfere with the exercise of administrative discretion in the selection of the precise forms and dimensions prescribed for containers. Compare also dissenting opinion of Justices Holmes and Brandeis in *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 517–534.[*]

It is clear that if confusion is minimized and honesty and fair dealing are promoted in enriched foods, public health will benefit. The court below seized upon this consequence of standardized enrichment as a basis for holding that the Administrator was irresponsibly furthering consumer health and public education in respect of dietary requirements instead of furthering honesty and fair-

[*] The Administrator's power to designate a minimum selection of vitamin and mineral additions does not differ in principle from his power to fix quantitative minima to prevent infinitesimal additions on which exaggerated advertising claims might be based. His authority to fix such quantitative minima and the desirability of doing so have not been questioned at any stage of these proceedings. See R. 45, 116, 136–167, 221, 409, 463, and 470.

dealing (R. 684–686).[41] But we submit that the improvement in public health resulting from the regulations under review is a practical advantage of the standards which is not fatal to their validity. The standards are genuinely designed to promote honesty and fair dealing through the elimination of confusion and misleading merchandising of vitamin and mineral enriched foods. The regulations do not require anyone to produce or buy "enriched farina"; the consumer can and must still choose for himself. The Administrator has merely taken steps to prevent deception likely to arise from representations of dietary efficacy implicit in the addition of special nutrients in farina and explicit in the merchandising of these products. In doing so he has considered the state of consumer education as an element in determining the probability of deception and in weighing the adequacy of the suggested alternative ways of combatting deception.

[41] It may be noted that, in any event, promotion of public health is not foreign to the purposes of the Food, Drug, and Cosmetic Act. Much of the hearings, debates, and committee reports were concerned with the effect of the legislation on health. The bill was captioned, "To prevent the adulteration, misbranding, and false advertisement of food * * * for the purposes of safeguarding the public health, preventing deceit upon the purchasing public, and for other purposes" (S. 5, 75th Cong., 1st Sess., Dunn, 636). It retained that title until a last minute abbreviation to the present form: "An Act to prohibit the movement in interstate commerce of adulterated and misbranded food, drugs, devices, and cosmetics, and for other purposes." 83 Cong. Rec. 7889, 7903; H. Rep. No. 2716, 75th Cong., 3d Sess., p. 21 (Dunn, 963, 991).

The situation with respect to vitamin D, respondent's enrichment, illustrates the relationship between public health, public education, and the misleading and confusing of the public. As a matter of public health it may be debatable whether vitamin D deficiency causes more harmful results than deficiency of the elements of whole wheat required by the standard. But consumer expectations have been conditioned to regard milled wheat products as nutritionally deficient in particular comparison to whole wheat (R. 45, 116, 122, 125, 150, 310–311, 500), not to sunshine or fish liver oil, the sole sources of vitamin D. To permit indiscriminate enrichment of a wheat product by leaving out the nutrients lost in milling whole wheat, while inserting those derived from sunshine or fish liver, or any other unrelated source of vitamins, at the miller's whim, would confuse and mislead by failing to take account of the one reasonably clear idea about nutrition which the record shows is safely in the public mind, that milled wheat products are somehow inferior to whole wheat.

C. The Administrator's treatment of vitamin D is reasonable

We have shown in Point A that the Administrator's finding that indiscriminate enrichment would tend to confuse and mislead consumers is supported by substantial evidence. He was, therefore, entitled to promulgate standards which would mini-

mize such confusion and misleading, and, as we have urged in Point B, the Administrator was authorized, under the Act, to draw these standards in such a manner as to exclude ingredients even if they are nondeleterious. There remains only the question whether there was a reasonable basis for the particular method selected by the Administrator, *viz*, exclusion of vitamin D from the definition of farina and a requirement that enriched farina, in which vitamin D is permitted, must contain four other named nutrients. We submit that there was such a basis and that the standards are therefore conclusive upon review.

1. At the outset the precise scope of the inquiry in this branch of the case must be delimited. If standards of identity issued under Section 401 of the Act may exclude nondeleterious ingredients, as we submit they may, and as indeed they must if confusion arising from multiple variations is to be minimized, plainly the Administrator must have a wide discretion in determining what to include and what to exclude. His problem is one of administrative regulation or legislation; and as in the ordinary process of legislation, there arises the familiar problem of where to draw the line. Accordingly, in testing the reasonableness of the line which is drawn, the issue cannot be whether the line may have been drawn at some other point. Indeed, it may be conceded *arguendo* that the Administrator

could reasonably have drawn the farina standard so as to permit the inclusion of vitamin D as an optional ingredient.[42] But clearly in this type of action it can rarely be established that any particular standard is impelled as the only correct one. The process of arriving at a proper regulation, like the congressional process of arriving at a law, is not a matter of simple mathematical or logical deduction leading to a single answer. Reasonable men basing their action on the same facts and findings could arrive at entirely different regulations, none of which could be properly characterized as arbitrary, whimsical, or unreasonable. The test of the validity of regulations of this nature, if judicial judgment is not entirely to replace administrative *expertise*, must therefore be limited to the inquiry whether the particular alternative which the administrative agency selected, among many alternatives, to achieve the objectives of the act under which it operates is one which a rational person could have chosen. *Final Report of Attorney Gen-*

[42] But see the testimony against permitting the inclusion of vitamin D in farina. R. 101-102, 361, 386, 413, 497. And in any event, presumably, if vitamin D were entitled to be included as an optional ingredient, a multitude of other nondeleterious ingredients has equal claim to optional inclusion. If the inclusion of vitamin D would logically require permission to include all other nondeleterious ingredients, there would be no advance to the goal of elimination of confusing and misleading consumers and no "standard" at all in our view of the meaning of that word.

eral's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 117.

This test, we submit, plainly is met in the instant case. As we have seen, some elimination was permissible and necessary to promote honesty and fair dealing by minimizing consumer confusion. The nature and history of the enrichment problem in relation to farinas, which we have summarized above (*supra,* pp. 18–21), furnish a sound basis for the particular choice made by the Administrator. Thus, the evidence, as we have shown, establishes that the original whole wheat berry, the ultimate source of farina products, includes the four ingredients, B_1, riboflavin, nicotinic acid, and iron, which the Administrator required as ingredients of enriched farina. Each of these ingredients is important to the diet; widespread deficiencies in these ingredients exist; and yet, by virtue of an evolution in milling processes, these vitamin and mineral constituents, particularly in respect of farina, were largely abstracted.

It is clear, therefore, that the Administrator's standards of farina and enriched farina were not artificial but rather an accommodation to existing natural, historical, and dietary phenomena. In essence, the farina standard is simply the definition of the basic product remaining after the milling process, while, on the other hand, the required elements of enriched farina result roughly in a restoration of the ingredients originally in the whole

wheat berry. In contrast, vitamin D, which respondent insists should have been permitted as an optional ingredient in the standard of farina, is not naturally related to farina; that vitamin is not contained in appreciable quantities in wheat, and its addition to farina is in that respect artificial." Moreover, to permit the addition of single vitamins to farina would blur the essential distinction in the identities of farina and enriched farina. We submit that, in these circumstances, there was a sound historical, natural, and dietary basis for the Administrator's treatment of vitamin D."

"Vitamin D and calcium, the optional ingredients of enriched farina, were permitted on the ground that they can readily be added to wheat and their deficiency is a serious shortcoming in the dietary of infants (Finding 40, R. 618; R. 422–424, 555–556).

"The conclusion is further fortified by the testimony of expert witnesses: To achieve a product which would meet consumer expectations by making a significant amelioration of the nutritional shortcomings of milled wheat, some industry witnesses proposed only vitamin B_1 as required, with other vitamins, calcium and iron as additional optional ingredients (R. 251, 443). This proposal was rested on the facts, already noted, that B_1 is milled out of wheat to a greater extent than any other factor on which figures were available and that B_1 deficiency is probably the most widespread in the country (see supra, pp. 18, 21). But other testimony was to the effect that diets lacking in B_1 are particularly likely to be deficient also in other members of the B complex, such as nicotinic acid and riboflavin (R. 287, 366, 388; cf. 443). These considerations of multiple deficiency led to recommendations of enrichment on a "restoration" basis, i. e., reintroducing into wheat products those nutritive elements which had been lost in the milling process (R. 42.

Nor are the standards unreasonable because, as the respondent has urged, the addition of the required ingredients are so expensive as to destroy his business. If the regulation is otherwise reasonable and within the statutory authority, it is immaterial that a particular manufacturer must change his methods or product or even that some products may be driven from the market. Cf. *Mugler* v. *Kansas*, 123 U. S. 623, 628–633; *Powell* v. *Pennsylvania*, 127 U. S. 678, 683–684; *Hebe Company* v. *Shaw*, 248 U. S. 297, 302–303; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 151. But in any event, the evidence establishes that the enrichment required is neither impracticable nor expensive. Vitamin B_1, riboflavin, nicotinic acid, and iron can be practicably replaced in farina by changes in the milling process designed to retain its natural content, or by the use of recently developed vitamin concentrates derived from natural sources or synthesized (R. 107, 128–131, 153–154). Although the cost of vitamins may appear to be high in terms of dollars per pound (e. g. B_1 costs $700

402). Still another witness favored "fortification" (R. 42, 104), i. e., not only reintroducing into the products the elements necessary to restore it to the approximate value of whole wheat, but also the addition of more of those elements than originally contained or the addition of other factors not originally contained, for the purpose of enabling the food to make good the deficiencies caused by other foods in the American dietary rather than making good only its own shortcomings. No witnesses who testified to the dangers of confusion from indiscriminate optional enrichment recommended less than "restoration."

per pound (R. 45, 65)), the minute quantities required results in an insignificant addition to the cost of production. The cost of the ingredients for enriching a barrel of flour was estimated at 35 to 75 cents (R. 365, 377, 477–479.) One witness testified that added vitamin B_1 would cost less than one tenth of a cent a pound and that the required enrichment would not substantially increase the price to consumers (R. 490, cf. R. 419). And the practice (R. 130–131, 268–269) among manufacturers of enriching their product by combinations of the ingredients here involved establishes that the Administrator's standard does not impose unfeasible or impracticable requirements.

2. Since, therefore, there was a reasonable basis for the exclusion of vitamin D in the standard of farina and its inclusion in combination in the standard of enriched farina, the Administrator's action is entitled to finality upon judicial review. The selection of means for effectuating the objectives defined in the Act is within the special province of the administrative agency; it is for the agency and not the reviewing court to say whether accurate labeling of a food constitutes sufficient protection against deception of consumers. *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, 484. The doctrine that the conclusions of administrative tribunals are not to be "disturbed except in the plainest cast" applies "with especial force" where the judgments are involved in promulgating regulations and are necessarily prospec-

tive. L. Hand, C. J., *National Broadcasting Co., Inc.* v. *United States*, not yet reported (S. D. N. Y., November 16, 1942), Nos. 554–555, probable jurisdiction noted, December 14, 1942. We submit that in holding the regulations unreasonable, the court below substituted its own judgment for that of the Administrator's "in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art." *Railroad Commission of Texas* v. *Rowan and Nichols Oil Co.*, 310 U. S. 573, 581.

CONCLUSION

For these reasons it is respectfully submitted that the judgment of the court below should be reversed.

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